In the District Court of the United States for the Eastern District of South Carolina

CHARLESTON DIVISION

CIVIL ACTION NO. 2657

HARRY BRIGGS, JR., et al., Plaintiffs,

against

R. W. ELLIOTT, CHAIRMAN, et al., Defendants

BRIEF AND ARGUMENT FOR DEFENDANTS

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STATEMENT

This is an action brought by colored children of the elementary, grammar and high school grades residing in School District No. 22 in Clarendon County, and their parents and guardians, for a declaratory judgment on questions which, from the complaint, may be stated as follows:

(a) Whether their rights under the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States to educational opportunities, advantages and facilities equal to those afforded and available to white school children of the same grades in the district have been denied; and

(b) Whether the provisions of the Constitution and Statutes "which prohibit" the colored children of the school district "from attending the only public schools of Clarendon County, South Carolina, affording an education equal to that afforded" to white children, are violative of the equal protection clause of the Fourteenth Amendment.

They allege that separate schools for the white and colored pupils are maintained in the school district pursuant to the provisions of Article XI, Section 7, of the Constitution of South Carolina, and Section 5377 of the Code of Laws of South Carolina of 1942; that the schools provided

for white pupils are superior in plan, equipment, curricula, and in all material respects to the schools provided for colored pupils; and that the Constitutional and Statutory provisions referred to deprive the colored pupils of the district of the opportunity of attending the only public schools in Clarendon County where they can obtain an education equal to that afforded to the white pupils.

The answer of the defendants alleged that substantial equality of educational facilities between the white and the colored pupils was afforded in the district. At the trial, however, an amendment to the answer was permitted by the Court, wherein the defendants conceded that the educational facilities, buildings, equipment, curricula and opportunities afforded in School District No. 22 for colored pupils of the school grades mentioned are not substantially equal to those afforded in the district for white pupils. It was pointed out in the amendment to the answer that the school district in question is a rural one whose economy is almost entirely agricultural, a type of school district in South Carolina which has not kept pace in recent years with the larger urban districts in the provision of educational opportunities and facilities to the children of both races. Reference was made to the legislation enacted by the General Assembly of the State of South Carolina in 1951, specifically declaring its purpose to be to bring about equality of educational opportunity for all children throughout the state, as a matter of statewide as well as local concern (including the imposition of a three per cent. sales tax, effective July 1, 1951, with the whole of its proceeds devoted to school purposes, the authorization of a state bond issue with a maximum limit at any one time of $$75,000,000.00, and financing therefrom to the school districts of the state for establishing and maintaining adequate physical facilities for the public school system, under the supervision and control of the State Educational Finance Commission created in the legislation).

The defendants allege that they will employ the financial resources made available to them under this legislation to bring about the equalization of buildings, equipment, facilities, and other physical aspects of the school system of the district, and will eliminate any other inequalities of educational opportunity existing in the district's schools, including curricula.

They do not oppose an order finding that inequalities in respect to buildings, equipment, facilities, curricula, and other material aspects of the schools provided for the white and colored children of School Dis-

trict No. 22 in Clarendon County now exist, and enjoining any discrimination in respect thereto.

They urge the Court, in its discretion, to give to the defendants a reasonable time to formulate a plan for ending such inequalities and for bringing about equality of educational opportunity in the schools of the district, so that they may present such plan, with the approval of the state authorities necessary under the 1951 legislation, for the Court's consideration. They suggest that the Court retain jurisdiction of the cause in the meantime so that, in the event the defendants should fail to comply with the constitutional standards prescribed in the applicable decisions, it may be enabled to grant such relief as may be proper under the circumstances.

The evidence shows that the white pupils of high school grades attend the Summerton High School, along with the white high school pupils of four other school districts of Clarendon County, School District No. 3, School District No. 4, School District No. 8, and School District No. 30. The total enrollment of the Summerton High School is 76, with an average daily attendance of 73. This high school is a centralized high school provided by the joint action of the five districts whose pupils attend it, and is operated by a high school district, a separate body corporate, which came into existence under the provisions of Section 5409 of the Code of Laws of South Carolina of 1942, with the chairmen of the several cooperating districts constituting its board of trustees under the provisions of Section 5406 of the Code of Laws. The defendant Elliott, as Chairman of the Board of Trustees of School District No. 22, is the only trustee of the centralized high school district who is made a party to this action, although the district itself is named as a defendant.

The Summerton Elementary School is a school provided and operated by School District No. 22, and is attended by the white pupils of elementary and grammar grades who reside in School District No. 22, as well as the white pupils of those grades who reside in the other four school districts above mentioned. The total enrollment in the Summerton Elementary School is 199, with an average daily attendance of 160.

School District No. 22 provides and operates three school buildings for colored pupils; Scott's Branch School, which combines elementary, grammar and high school grades, with 12 grades and 14 teachers, Lib-

erty Hill Elementary School which has 7 grades and 4 teachers, and Rambay Elementary School which has 7 grades and 2 teachers.

The high school enrollment of colored pupils in Scott's Branch School is 149, with an average daily attendance of 124. This enrollment is made up of the colored pupils of high school grade who reside in School District No. 22, as well as those residing in the other four school districts above mentioned. The total elementary and grammar enrollment of colored pupils in the three schools of School District No. 22 is 717, with an average daily attendance of 469.

The total enrollment of white pupils in the five districts is 277, with an average daily attendance of 253, or approximately 91%. The total enrollment of colored pupils in the five school districts above mentioned is 2,144, with an average daily attendance of 1,538, or approximately 72%. Colored absenteeism is heavy at the beginning and end of the school year, when children are kept home by the parents to help with the planting and harvesting.

The evidence shows that under the 1951 legislation School District No. 22 will be enabled to borrow against the State School Fund created in the act, the sum of $190,350.00, on the basis of the present average daily attendance of pupils above shown. Including the centralized white high school, the value of the school buildings, the grounds and the furniture and fixtures of School District No. 22 at present is $70,050.00, so that it will be seen that the amount available to the district under the 1951 act is more than two and a half times the value of the centralized high school building and all of the school property, grounds, furniture and fixtures in School District No. 22 at the present time.

The evidence affords clear indication that the five school districts above mentioned offer a natural consolidation of districts, in keeping with the purpose and provisions of the 1951 act. The evidence also shows that the five districts together will have a borrowing capacity under the 1951 act of a total of $402,975.00, available for capital construction and furniture, fixtures and facilities.

Both School District No. 22 and the combined five school districts will have an increased borrowing capacity with any increase in the present low average daily attendance of the colored pupils.

The evidence (R. 152) shows that the Summerton Elementary School (white) which was built in 1907 is practically beyond repair,

and (R. 57) that the Scott's Branch School (colored) can give approved and efficient education if it be improved. The funds available to the five districts for financing capital construction and equipment amount to $187.00 for each pupil enrolled, and loans available to the districts under the Act would provide $5,610.00 per class-room unit of 30 pupils on the present enrollment. With bus transportation provided for in the Act, it is fair to assume that the two-teacher and four-teacher schools will disappear in the districts.

The degree of control vested in the State Educational Finance Commission is shown by its rule making power, Article III, Section 3; its duty to make a survey of the entire school system to ascertain what construction, equipment, new transportation facilities, and other improvements are necessary "to enable all children of South Carolina to have adequate and equal educational advantages," Article III, Section 4; and its power to deny applications for the use of State building funds under the Act until an acceptable and reasonably satisfactory plan has been submitted, Article IV, Section 3.

The evidence shows (R. 151) that the defendant trustees will use the full potential of the district to obtain funds, and utilize them to the fullest advantage to develop the educational facilities and education in the district.

ARGUMENT

Article XI, Section 5, of the Constitution of South Carolina provides:

> "The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years. * * *"

Article XI, Section 7, with reference to the schools of such school system, provides:

> "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Section 5377 of the Code of Laws provides:

> "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race. * * *"

The plaintiffs contend that the constitutional and statutory provisions prescribing separate schools for children of the white and colored races

on their face contravene the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States.

Consitutionality of Separate Schools

Separate schools for the white and colored races have existed in most of the states of the United States, both before and since the ratification of the Fourteenth Amendment, and still exist by law in 17 states and in the District of Columbia.

In 1849 in *Roberts v. City of Boston,* 5 Cush. 198, the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon other schools. The plaintiff in that case, represented by a "learned and eloquent advocate," Charles Sumner, relied upon "The great principle * * * that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law * * *."

This principle is at least as broad as the equal protection of the laws clause of the Fourteenth Amendment.

The Court, through Chief Justice Shaw, held:

> "But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

The Court there held that the powers of the committee extended to the establishment of separate schools for children of different ages, sexes, and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools.

The Fourteenth Amendment was declared adopted July 28, 1868. The Congress had already established separate schools for the colored pupils in the District of Columbia, *Carr v. Corning,* 182 F. (2d) 14, and during Congressional consideration of the resolution proposing the

Fourteenth Amendment the Congress enacted measures dealing with the separate schools for the two races in the District [14 Stat. 343 (1866); 14 Stat. 216 (1866)]. In 1874, as a part of the Revised Statutes for the District of Columbia, the Congress provided for separate schools in the District [Sections 281 and 282 of Revised Statutes Relating to the District of Columbia, U. S. Gov. Printing Office, 1875], and the legislation presently in force provides for separate schools in the District [District of Columbia Code (1940 Ed.), Section 31-1110, 1111, 1112, 1113]. After the Fourteenth Amendment, the Congress consistently refused to include the public schools in the Civil Rights legislation [*cf.* 42nd Cong., 2nd Sess., p. 3270, 3734, 3735; 43rd Cong., 2nd Sess., pp. 997, 1010, 1011], although a number of efforts were made to include such schools therein.

After the Fourteenth Amendment became effective, a number of State Court decisions were rendered on the question whether separate public schools for the white and colored races denied rights safeguarded by the equal protection of the laws clause in that Amendment.

In 1871, the statutory provision of Ohio regarding separate schools was challenged as being in contravention of the Fourteenth Amendment. In *State ex rel. Carnes v. McCann,* 21 Oh. St. 198, the Court held:

> "Unquestionably all doubts, wheresoever they existed, as to the citizenship of colored persons, and their right to the 'equal protection of the laws,' are settled by this amendment. But neither of these was denied to them in this State before the adoption of the amendment. At all events, *the statutes classifying the youth of the State for school purposes on the basis of color,* and the decisions of this court in relation thereto, were not at all based on a denial that colored persons were citizens, or that they are entitled to the equal protection of the laws. It would seem, then, that these provisions of the amendment contain nothing conflicting with the statute authorizing the classification in question, nor the decisions heretofore made touching the point in controversy in this case.
>
> "* * * conceding that the 14th amendment not only provides equal securities for all, but guarantees equality of rights to the citizens of a State, as one of the privileges of citizens of the United States, it remains to be seen whether this privilege has been abridged in the case before us. The law in question surely does not attempt to deprive colored persons of any rights. On the contrary *it recognizes their right, under the constitution of the State, to*

equal common school advantages, and secures to them their equal proportion of the school fund. *It only regulates the mode and manner in which this right shall be enjoyed by all classes of persons. The regulation of this right arises from the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all.* But this task must, of necessity, be left to the wisdom and discretion of some proper authority. *The people have committed it to the general assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all.*

"At most, the 14th amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the State.

"The question, therefore, under consideration is the same that has, as we have seen, been heretofore determined in this State, that *a classification of the youth of the State for school purposes, upon any basis which does not exclude either class from equal school advantages, is no infringement of the equal rights of citizens secured by the constitution of the State.*" (Emphasis added.)

In 1872, in *People ex rel Dietz v. Easton,* 13 Abb. (N. Y.) Pr. (N. S.) 159, the New York court held that, under a statute providing for separate equal schools, excluding colored pupils from schools provided for white pupils did not violate the Fourteenth Amendment.

In 1873 the Pennsylvania court, in upholding a statute providing for separate schools, said in *Commonwealth v. Williamson,* 30 Legal Int. (Pa.) 406:

"In the case before us, *we fail to discover that any great constitutional question is involved,* or that any right of the relator, or his children, growing out of the Fourteenth Amendment of the Constitution of the United States, or under the Civil Rights Bill, has been challenged, invaded or denied. * * *" (Emphasis added.)

In 1874, in *Cory v. Carter,* 48 Ind., 327, the Indiana court held that separate schools did not violate the Fourteenth Amendment, observing with reference to the Thirteenth, Fourteenth and Fifteenth Amendments:

"In our opinion, such amendments have not in any other respect imposed restrictions or limitations upon the sovereign power of the State. From this it results that *there is no limitation upon*

the power of the State, within the limits of her own constitution, to fix, secure, and protect the rights, privileges, and immunities of her citizens, as such, of whatever race or color they may be, so as to secure her own internal peace, prosperity, and happiness.

"In our opinion, *the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class.* * * *"

"The action of Congress, at the same session at which the fourteenth amendment was proposed to the States, and at a session subsequent to the date of its ratification, is worthy of consideration as evidencing the concurrent and after-matured conviction of that body that *there was nothing whatever in the amendment which prevented Congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony, and welfare of the public;* and if no obligation was expected to be or was imposed upon Congress by the amendment, to place the two races and colors in the same school, with what show of reason can it be pretended that it has such a compelling power upon the sovereign and independent states forming the Federal Union

"We refer to the legislation of Congress relative to schools in the District of Columbia, at the first session of the Thirty-Ninth Congress, and the third session of the Forty-Second Congress." (Emphasis added.)

The Indiana court then review congressional legislation on separate schools in the District of Columbia, and said:

"This legislation of Congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the states for their approval and ratification."

Also in 1874 the California Supreme Court had occasion to decide whether a statute providing separate schools violated the Fourteenth Amendment, in *Ward v. Flood,* 48 Cal. 36. The Court said:

"* * * nor do we discover that the statute is, in any of its provisions, obnoxious to objections of a constitutional character. It provides in substance that schools shall be kept open for the admission of white children, and that the education of children of African descent must be provided for in separate schools."

And further:

"* * * our duties lie wholly within the such narrowed range of determining whether this statute, in whatever motive it originated, denies to the petitioner, in a constitutional sense, the equal protection of the laws; and *in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.*" (Emphasis added.)

In *Bertonneau v. Board of Directors,* 3 Fed. Cases 294, decided in 1878, the Court held:

"Is there any denial of equal rights in the resolution of the board of directors of the city schools, or in the action of the subordinate officers of the schools, and set out in the bill? *Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The state,* while conceding equal privileges and advantages to both races, *has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.*

"The state may be of opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. By such a policy can it be said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. *Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of right does not necessarily imply identity of rights.*" (Emphasis added.)

In *People ex rel King v. Gallagher,* 93 N. Y. 438, decided in 1883, the validity of the separation of white and colored pupils in the public schools was before the court, and it was held:

"The highest authority for the interpretation of this amendment is afforded by the action of those sessions of Congress which not only immediately preceded, but were also contemporaneous with the adoption of the amendment in question." (The court then discusses several Acts of Congress on the District of Columbia.)

"If regard be had to that established rule for the construction of statutes and constitutional enactments which require courts, in giving them effect, to regard the intent of the law-making power, it is difficult to see why the considerations suggested are not controlling upon the question under discussion.

"The question here presented has also been the subject of much discussion and consideration in the courts of the various States of the Union, and it is believed has been, when directly adjudicated upon, *uniformly determined in favor of the proposition that the separate education of the white and colored races is no abridgement of the rights of either.*" (Emphasis added.)

And further:

"The argument of the appellant's counsel, which is founded upon that clause of the Constitutional amendment granting to every citizen the equal protection of the law, must fall with, his main argument as being founded upon the unwarranted assumption that this protection has been denied to the relator in this case. *Equality and not identity of privileges and rights is what is guaranteed to the citizen, and this we have seen the relator enjoy.*"

See also:

State v. Grubbs (1882), 85 Ind. 213;
State v. Gray (1884), 93 Ind. 303;
Dallas v. Fosdick (1869), 40 How. Prac. (N. Y.) 249;
State v. Board of Education (1876), 7 Oh. Dec. 129;
Maddox v. Neal (1885), 45 Ark. 121;
Chrisman v. Town of Brookhaven (1893), 70 Miss. 477;
Lehew v. Brummell (1891, Me.), 15 S. W. 785;
McMillan v. School Committee (1890), 107 N. C. 609;
Puitt v. Gaston Co. (1886), 94 N. C. 709.

In 1896, the Supreme Court of the United States decided *Plessy v. Ferguson,* 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, and held that a state statute requiring separate railway coaches for white and colored passengers on intrastate trains did not deny equal protection of the laws in violation of the Fourteenth Amendment.

The question there presented was a more difficult question than that presented in the separate schools cases. *Gong Lum v. Rice,* 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172.

The Court relied upon the analogy of the school cases, and the state court decisions and congressional action in reference to separate schools in the District of Columbia under the Fourteenth Amendment, to sustain the classification under that amendment.

The Court said:

> "The object of the (14th) Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not ncessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. *The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.* * * *" (Emphasis added.)

The Court also held that in determining the question of the reasonableness of the exercise of a State's legislative power "there must necessarily be a large discretion on the part of the legislature," and that "it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

The Court rejected as unfounded the argument that the enforced separation of the two races stamps the colored race with a badge of inferiority, and observed:

> "The argument also assumes that social prejudices may be overcome by legislation, *and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition.* If the two races are to meet

upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher,* 93 N. Y. 438, 448, *'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community* upon whom they are designed to operate. *When the goernment, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.'* Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically." (Emphasis added.)

It should be observed that the administrative practice of assigning the white and the colored pupils to separate schools did not originate with, and does not depend upon *Plessy v. Ferguson, supra,* for its validity. The question had been settled by many courts and by the Congress under the 14th Amendment years before *Plessy v. Ferguson* reached the Supreme Court. Such administrative practice was the "common instance" of separating the two races which the Court used as a recognized, settled and accepted analogy in support of the classification upheld in *Plessy v. Ferguson.*

Mr. Justice Harlan dissented in *Plessy v. Ferguson,* and his dissent is always referred to in attacks made upon the authority of that decision. It cannot logically be used, however, to challenge the validity of separate schools for the two races under the 14th Amendment, for Mr. Justice Harlan himself showed clearly in later decisions that he recognized a difference in cases of separation involving State public schools.

In *Cumming v. Board of Education,* 175 U. S. 526, 20 S. Ct. 197, 44 L. Ed. 262, a case brought under the 14th Amendment, he wrote the opinion of the Court, in which he stated:

"* * * the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear

and unmistakable disregard of rights secured by the supreme law of the land."

And in *Berea College v. Kentucky,* 211 U. S. 45, 29 S. Ct. 33, 53 L. Ed. 81, in which the Court held that the State could, without violating the 14th Amendment, prohibit the teaching of white and colored students together in the same private school or college, Mr. Justice Harlan, in his dissenting opinion, said:

> "Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense."

The question of the power of a State through its legislature to require separate public schools under the 14th Amendment was expressly recognized by the Court in *Gong Lum v. Rice,* 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172, as having long since been set at rest. There the Court, in a unanimous decision delivered by Chief Justice Taft, after quoting the references to separate schools in *Plessy v. Ferguson, supra,* held:

> "* * * we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

And further:

> "The right and power of the state *to regulate the method of providing for the education of its youth at public expense* is clear. * * *
>
> "The Decision is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment." (Emphasis added.)

The Court which decided that case, in addition to Chief Justice Taft, was composed of Justice Holmes, Van Devanter, Brandeis, Stone, McReynolds, Sutherland, Butler and Sanford.

In *Missouri ex rel Gaines v. Canada,* 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208, the Court, in a law school case, said that the State had sought to fulfill its recognized obligation to provide Negroes with advantages for higher education substantially equal to the advantages afforded for white students "by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions."

The validity of such method was again recognized in *Sipuel v. Board of Regents,* 332 U. S. 631, 68 S. Ct. 299, 92 L. Ed. 247, and in *Fisher v. Hurst,* 333 U. S. 147, 68 S. Ct. 389, 92 L. Ed. 604; and the Court expressly refrained from re-examining the case of *Plessy v. Ferguson, supra,* in *Sweatt v. Painter,* 339 U. S. 629, 70 S. Ct. 848, 94 L. Ed. ___, although urged to do so. *Cf. Boyer v. Garrett,* 183 F. (2d) 582.

Since the decision in *Plessy v. Ferguson, supra,* the courts of Alabama, Alaska, Arkansas, Arizona, the District of Columbia, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, and West Virginia have upheld the constitutionality of State regulations prescribing separate schools.

In *People v. School Board of Queens* (1900) 161 N. Y. 598, 56 N. E. 81, upholding the right "to maintain separate schools for the education of colored children," the Court said:

> "If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. *It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained.* * * *" (Emphasis added.)

And in *State ex rel Weaver v. Board of Trustees of Ohio State Univ.* (1933) 126 Ch. St. 290, 185 N. E. 196, the Court, in a case where an equivalent home economics course was offered to a Negro applicant, held that

"The respondents had full authority to prescribe regulations that will prove most beneficial to the university and state and will best conserve, promote, and secure the educational advantages of all races. The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws or by the state and Federal Constitutions." (Emphasis added.)

There are state court decisions holding separate schools invalid under state constitutional or statutory provisions, such as *State v. Duffy,* 7 Nev. 342; *Clark v. Board of Directors,* 24 Iowa 266; *People v. Board of Education,* 18 Mich. 400; *Chase v. Stephenson,* 71 Ill. 383; *Smith v. Board of Directors,* 40 Iowa 518; and *Dove v. Ind. School Dist.,* 41 Iowa 689. But we have failed to discover *any decision, Federal or State,*

in the period immediately after the adoption of the 14th Amendment or since then, or any action of the Congress, which casts any doubt upon the right of a State in regulating its public schools to provide separate schools for the pupils of the white and the colored races.

Provisions for separate schools are by nature administrative regulations, adopted in the light of considerations which a State or its school authorities may properly take into account in arranging for the efficient functioning of the State's public schools, the best interests of the schools, of the state, and of the educational advantages of the two races alike. *The State may act upon the question on the basis of administrative reality.*

The authorities show that such regulations were a normal practice prior to the 14th Amendment, were followed in the District of Columbia by the Congress that debated and submitted the 14th Amendment to the States for ratification, and were observed by almost all of the States which now do not have such a regulation, until such times as their respective legislatures determined that separate schools should no longer be provided in their public school systems.

Under the authorities, State regulations prescribing separate schools in the State's public school system would be valid even if pure police power measures such as these upheld in *Plessy v. Ferguson, supra,* and in *Berea College v. Kentucky, supra,* had been or were held invalid under the 14th Amendment. [*Cf. Gong Lum v. Rice, supra*; Mr. Justice Harlan's dissenting opinion in *Berea College v. Kentucky, supra.*]

The decisions relied upon by the plaintiffs have no authoritative application to the question. *Shelley v. Kraemer,* 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. (2d) 441, involved discrimination in the right to own and occupy property. So did *Oyama v. California,* 332 U. S. 633, 68 S. Ct. 369, 92 L. Ed. 249. *Hirabayashi v. United States,* 320 U. S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774, and *Koramatsu v. United States,* 323 U. S. 214, 63 S. Ct. 193, 89 L. Ed. 194, involved orders excluding Japanese from certain areas in wartime. *Nixon v. Herndon,* 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759, was a primary voting case. *Steele v. L. & N. R. Co.,* 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, was a right to work case; *cf. Yick Wo v. Hopkins,* 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed., 220. *Sweatt v. Painter, supra,* was a professional school case. *Henderson v. United States,* 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. ——, and *Mitchell v. United States,* 313 U. S. 80, 61 S. Ct. 873, 85 L. Ed. 1201, involved unreasonable exclusion

from interstate train facilities not occupied or in use. *Chance v. Lambeth,* 186 F. (2d) 379, and *Whiteside v. Southern Bus Lines,* 177 F. (2d) 949, involved burdens on interstate commerce. *McLaurin v. Board of Regents,* 339 U. S. 637, 70 S. Ct. 851, 94 L. Ed. ....., involved discrimination in the only facility furnished to the student by the state. *Rice v. Arnold,* 71 S. Ct. 77, was sent back for reconsideration on the question of equality of facilities in relation to use of a publicly owned golf course.

In the oral argument counsel for the plaintiffs contended (p. 234):

> "The defendant (*sic*) hasn't produced one single witness to show that that statute is a reasonable classification—not one. Not a witness has been produced to show that that statute came about as a result of mature judgment."

The recorded history of South Carolina reveals clearly that the provisions for separate schools came about after the State had had some 12 years of experience with mixed schools in the period from 1865 to 1877. The constitutional convention held in South Carolina in 1866 debated the question of separate or mixed schools, and adopted a provision for the latter. We read of that convention's action in *Public Education in the South,* by Dr. Edgar W. Knight, Professor of Education in the University of North Carolina, published in 1922, at page 322, as follows:

> "The debate concluded by the chairman of the committee, the Reverend E. L. Cardozo, a negro member who finally became treasurer of the State. He argued that the whole scheme of reconstruction was antagonistic to the wishes of South Carolina and that the mixed-school plan was a legitimate part of that scheme. Race prejudices could best be removed, he said, by forcing the white children and the negro children 'to mingle in school together and to associate generally.' In some communities, however, it might be necessary to provide separate schools, but for a few white children 'to demand such separation would be absurd, and I hope that the convention will give its consent to no such proposition.' This was the final word on the subject in the convention, and the vote gave an overwhelming majority for the mixed-school section.
>
> "Referring to this action of the convention in his message to the Legislature in July, Governor Orr, who was retiring from office, said that the provision for mixed schools was a reckless and dangerous experiment and was not desired by the negroes or the whites,

and if submitted to their decision the provision would have been completely repudiated by both. He noted also the causes for bickering and controversy already existing between the two people, and declared that 'no greater cruelty could be inflicted by legislation upon the parents of the children of the two races, than that which is contemplated by this objectionable feature of the constitution.' Governor Scott, who succeeded Orr, shared the latter's opinion of the constitutional provision for mixed schools and likewise urged, in his message to the Legislature, the establishment of separate schools for the education of the children of the State. He believed the separation of the children in the public schools 'a matter of the greatest importance to all classes of our people.' " Later he said:

" 'It is the declared design of the Constitution that all classes of our people shall be educated, but not to provide for this separation of the two races will be to repel the masses of the whites from the educational training that they so much need, and virtually to give our colored population the exclusive benefit of our public schools. Let us, therefore, recognize facts as they are and rely upon time and elevating influences of popular education to dispel any unjust prejudices that may exist among the two races of our fellow citizens."

The unhappy result of the mixed-schools provision are thus summarized in Dr. Knight's article entitled *"Reconstruction and Education in South Carolina,"* which appeared in *The South Atlantic Quarterly,* Vol. XVIII, No. 4, October, 1919, and Vol.XIX, No. 1, January, 1920:

"The presence and influence of the negro in political, educational and social affairs also complicated an otherwise unhappy condition. Just how far the promoters of mixed school legislation excepted it to extend is a matter for conjecture, but that it was perhaps the most unwise action of the period is a certainty, lending itself to a most unfortunate and damaging reaction for many years after the return to home rule. The principal objection raised to the school system during this time arose from the fear of mixed schools, a provision which was not demanded by either race. On the contrary, both races were violently opposed to the scheme and the friends of the schools constantly urged the adoption of separate schools. But the agitation in Congress of the Civil Rights Bill in 1872 had here, as in other southern states, the effect of aggravating a

prejudice which had begun to develop with the state constitutional provision for mixed school."

And further:

"It was many years, therefore, before confidence could be restored and the principle of universal and free education could gather sufficient strength to give it wide acceptance and popular approval. Here, as in the other southern states, it has been difficult to recover from the ills inherited from the reconstruction practices following the close of the Civil War, and here, as elsewhere in that region, the stigma and the reproach of the indignities and the injustices of that period have been a deadly upas to the cause of public education. Only in recent years has recuperation been rapid enough to assure promise of a better day in public education."

So much for the background of the adoption of the challenged provisions. The propriety of the administrative practice of separate schools at the present time and under present conditions in South Carolina is fully sustained by the opinion and judgment of leading sociologists and educators who, unlike the witnesses for the plaintiffs, have the basis, in years of research, observation, and practical experience in states where the two races live in the same areas in great numbers, which validates and gives compelling substance to their informed judgment publicly expressed.

The witness, E. R. Crow, with years of experience as superintendent of the school affairs of Sumter, S. C. (having approximately 7,200 children in its schools in the proportion of 53% white and 47% colored), testified that in the light of his experience as a school administrator, assuming that separate schools were neither commanded nor prohibited by law, and that the several schools of the school system afford substantially equal educational facilities and opportunities, it would be unwise in administrative practice in his opinion to mix the two races in the same schools at the present time and under present conditions; that it would be impossible to have sufficient acceptance of the idea of mixed groups attending the same schools to have public education on that basis at all; that there would not be community acceptance of mixed schools at this time; that there would be a probability of violent emotional reaction in the communities; that it would be impossible to have peaceable association of the races in the public schools; and that it would eliminate the public schools in most, if not all, of the communities in the State. (R. 127, 128.)

Those who are familiar with local conditions in South Carolina know that Mr. Crow was not overstating the case. The reasons for such results are as yet deep rooted in the people of such a State as South Carolina, and those reasons are indicated sociologically in some detail by Dr. Howard W. Odom, Kenan Professor of Sociology in the University of North Carolina, in a recent address delivered by him to the Southern Sociological Society in Atlanta, Ga., on April 27, 1951, entitled "The Mid-Century South: Looking Both Ways." Dr. Odum's years of research in the field of racial relations in the Southern states; his untiring efforts to bring about progress in that field; and his acknowledged freedom from anything which could even remotely be suggested as prejudice or preconceived approach to racial questions, are widely known; and it is believed that he is the best informed authority in the country on Southern racial matters and the considerations which must be taken into account in evaluating and dealing with them.

In his Atlanta address, Dr. Odum set forth what he termed "four main segments or levels calling for mature and quick action on a statesmanlike basis" in achieving the ultimate solution of the South's racial problems:

> "The first is to remedy the inexcusable situation with reference to brutalities, injustices, inequalities, and discrimination to which we have referred.
>
> "The second is to set up what would currently be designated as 'Operation Equal Opportunity' to comprehend all phases of public education.
>
> "The third is to provide immediately for non-segregation in all university education on the graduate and professional level.
>
> "The fourth is to move judiciously but speedily toward agenda for negotiations and specifications for future achievement on the total front."

He said:

> "First in the southern situation is the cumulative racial and conflict heritage that has gone into the architecture of all cultures, whether in the bi-racial South or in India, in Pakistan, in China, in all the way-places of Africa, Australia, New Zealand, and in uncounted little culture islands of the Pacific; and in counted big nations and little democracies of the western world. This heritage, which is basic to conflict and war, is also the very heart of group loyalties, patriotism and institutional solidarity, symbolic of the

universal formula by which men convenant 'for God, for country and for home.' The Southern culture structure rates the same diagnosis as any other.

"In the Southern situation is the same cumulative heritage which leads India's powerful Nehru, as late as yesterday and in tomorrow's news, to beg for the preservation of world peace and world order with hope and faith, but with an appeal for character and patience. But he adds, 'Anyway we can't have it suddenly or by decree. One has to grow up to it;' and again, in what he terms 'an unbelievable varied world', he protests the quick 'imposition of any form of foreign domination against the will of the people', on the structural grounds that 'no solution which is not accepted by large masses of the people can have any possible enduring quality.' Nor could Nehru relish the stereotype designation of being caricatured as a 'gradualist', outmoded echo of superficial rationalization."

He says further:

"The above agenda for equalizing educational opportunities applies to all levels of schooling and assumes the normal status and processes of segregation *and* non-segregation consistent with the development and administration of educational systems everywhere. It assumes a certain inevitable continuity of the sub system featuring primarily segregation in the public schools but with both non-segregation and segregation modes and privileges in institutions of higher learning. This is necessary to insure equality of opportunity for the extraordinary Negro institutions, teachers, students, and administrative officers in ways which will give maximum recognition and opportunity for Negro professional folk and students."

After urging immediate ending of segregation in graduate and professional schools, he stated:

"That this is a structurally different situation from elementary and secondary schools, in the framework of America's private, religious, and public school system will be as manifest to the courts as it is to the executive and legislative units of government and to the practical administrative constituency of American education."

He warned:

"If there are those who hold that the South, having too many people of both races anyway, would profit by a certain amount of violent revolution, and slaughter of the people, as I have heard

prominent metropolitan leaders say, that might be a democratic prerequisite; but to urge the Supreme Court to set the incidence of such a conflict is something else."

And further:

"Anyone who is not naive enough to try to repeal the laws of individuation, of personalty, of freedom, of opportunity, or classification, knows that the major construct is not segregation *or* non-segregation but non-segregation *and* segregation, developed through total processes of interaction and of growth, of means and ends, of moral imperatives and administrative reality."

Finally, as to the conversion of the "Southern compound bi-racial culture to an American complex integrated multicultured society", Dr. Odom says:

"Such a conversion brings with it no more compulsion or specifications for negating the facets of race and ethnic minorities, supreme in whatever personality and cultural loyalties they may wish. Such a conversion automatically, as in any organic structure or process, carries with it the inevitable continuity of separateness, autonomy, and segregation inherent in not only the American ideal but in all the newer reaches of social science, philosophy, freedom for all the differential-groups to have a say in how they shall integrate themselves into the new world society."

Another distinguished educator and outstanding liberal, Dr. Frank P. Graham, formerly President of the University of North Carolina, and one qualified to express an informed judgment on the racial matters facing the Southern states, had this to say in an address delivered April 9, 1951, to a joint assembly of the North Carolina legislature at the unveiling of the portrait of Governor Charles B. Aycock:

"In view of the origin, history, and power of the 'mores' of peoples based on the universal consciousness of kind, an historic social heritage, the degree of the visibility of the difference between races, the largeness of the members of the groups involved and the economic competition of the low income groups, there is needed a new emphasis on the influence of religion, education, personal kindness, decent respect for the human dignity of persons, and voluntary cooperation of people of good will for better relations in the local communities, in the long haul of the generations for justice on this earth. To our good Northern friends, I emphasize the unwisdom

of using federal legislation and force at educational levels beyond the levels of acceptance by the people in the States. Such unwise compulsions cause bitter set-backs not enduring progress which mainly comes from within the minds and hearts of the majority of the people in the States."

In an address entitled "Justice and Opportunity", made November 28,1950, to the Southern Governors' Conferences at Charleston, President Colgate W. Darden, Jr., of the University of Virginia, after acknowledging that separate facilities were too often not equal and advocating constructive effort toward the speedy solution of the South's racial problems, said:

"The Southern people are overwhelmingly opposed, in my opinion, to mixed public schools. * * * This is not difficult to understand. People feel quite differently about young children, and they are not willing to make the concessions as to their education that they are willing to make in the cases of those who are more mature. To undertake to set up mixed public schools in the face of this sentiment would be to open up a fostering wound that would sap our strength and destroy that unity without which there is no hope for substantial progress for either race in the South."

Hodding Carter recently wrote (Equality in America: the Issue of Minority Rights. Compiled by George B. de Ruszar. The Reference Shelf, Vol. 21, No. 3, page 101):

"It will be tragic for the South, the Negro and the nation itself if the government should enact and attempt to enforce any laws or Supreme Court decisions that would open the South's public schools and public gathering places to the Negro. The one saving factor in such an event would be the southern Negro's own common-sense refusal to implement the law. * * *

"The Southern Negro, by and large, does not want an end to segregation in itself any more than does the southern white man. The Negro in the South knows that discriminations, and worse, can and would multiply in such event. He knows that these things which he does want—the vote, educational opportunities and the rest—are more readily attainable in a South that is not aroused against federal intervention in the field of segregation. * * *."

In Myrdal, "An American Dilemma", Chapter 41, "The Negro School", Section 6, it is stated:

"Negroes are divided on the issue of segregated schools. In so far as segregation means discrimination and is a badge of Negro inferiority, they are against it, although many Southern Negroes would not take an open stand that would anger Southern whites. Some Negroes, however, prefer the segregated school, even for the North, when the mixed school involves humiliation for Negro students and discrimination against Negro teachers. Du Bois has expressed this point of view succinctly:

"'* * * theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile opinion, and no teaching concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural, basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, sympathy, knowledge, and the Truth, outweigh all that the mixed school can offer.'

"Other Negroes prefer the mixed schools at any cost, since for them it is a matter of principle or since they believe that it is a means of improving race relations."

In a survey prepared for the U. S. Department of Education on higher education of Negroes by Dr. Ambrose Caliver, a Negro who was senior Specialist on Negro Education in the U. S. Office of Education from 1930 to 1945, it is stated:

"In some of the States the *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions. * * *" Vol. II Misc. No. 6, p. 17, National Survey of Higher Education for Negroes.

The evidence adduced by the plaintiffs from the psychology, education and anthropology witnesses called by them to the stand affords no basis in law or in fact for impugning the power of the State, in its constitution and in its legislative enactments, to deal with its public school system, and make regulations assigning the two races to separate public schools for the purpose of their education. Such evidence, like the

quotations made above from the general learning and informed judgment on the subject, would be properly for legislative consideration, but not a basis for a court decision invalidating such legislation.

The witness McNally, an associate professor of education, expressed the view that, in modern conceptions of education, all the experiences a child has in the school constitute his education (R. 67), and that the purpose of education in a country such as ours, a Democracy, is to develop in each individual a real meaning for the phrase "respect for personalities" or "respect for individualities, and respect for others," that the public schools are about the only institutions in the United States where children of all circumstances, levels, beliefs, races, and colors come together for instruction, and that separate schools "short change" children of both races in that they have no opportunity to learn to value each other and one another as individuals (R. 68).

This witness admitted that he had never made a study of any school system in South Carolina, in any other Southern state, or in any state which by law has separate schools for the two races, and had made no inquiry into the factors and problems which have motivated these states in establishing separate schools.

It is obvious that the State has the power to provide a system of education in its public schools for the purpose of instruction in reading, writing and arithmetic, and other subjects of education, and is not required to adopt any theory of education which seeks to employ its schools as agencies of social adjustment and personality development.

If the State had to provide its schools on such a basis or forego the public schools, it would logically have to go further in eliminating separate schools and also eliminate religious and private schools, requiring all pupils to attend its public school system. That this would be beyond the power of the State under the 14th Amendment is established by *Pierce, Governor of Oregon et al. v. Society of Sisters,* and *Pierce, Governor of Oregon v. Hill Military Academy,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468.

The witness Knox also approached the matter in the light of the overall objective for preparing children to become members of the human race and not distinct races as such, and in the light of "our American Democracy" and on the theory that segregation cannot exist without discrimination disadvantageous to the minority group (R. 74). This witness admitted that the ways of life and emotionalisms must be taken

into account, and also that he had nothing but hearsay information as to the situation in School Disrict No. 22.

The witness Clark, an assistant professor of phychology, testified to a certain doll test devised by him and his wife which was used on 16 colored children in the schools of School District No. 22 whose names were furnished him on a list previously prepared by a representative of the N. A. A. C. P., and his oral questioning of some 10 older colored pupils. The method used had been actually used on only about 400 pupils in widely scattered places prior to the witness' visit to Clarendon County. He drew some psychological conclusions from its application to 16 pupils, directed to the existence of race consciousness in the children, and that "discrimination, prejudice and segregation have definitely detrimental effects on the personality development of the Negro children." (R. 86.)

It is difficult to believe that the plaintiffs would expect weight to be given to this witness' testimony, with no other research or inquiry into the situation in School District No. 22 or elsewhere than he has made, according to his testimony. It is not without significance that the witness Mrs. Helen Trager, who testified to a study made by her of some 250 white and colored pupils in the Philadelphia schools, stated that she found 5 year old school children of both races had racial consciousness and racial prejudice obviously developed in the homes (R. 173, 174, 181), and this in a community which does not have separate schools or segregation laws, and does have a Civil Rights Law.

Dean Hupp's evidence is obviously of no weight in the instant case, first because he is talking about education at college level, and secondly because he has made no research and investigation into conditions prevailing in a state like South Carolina or a section like Clarendon County, and did not undertake to qualify himself as an expert on questions affecting public schools.

Of the witness Kesselmann, counsel for the plaintiffs rather aptly stated that the other witnesses be expected to call are "REAL" scientists, and it is obvious from this witness' evidence that his statements were purely theoretical.

The witness Krech, a professor of social psychology, gave his opinion of legal segregation in general, based upon what he had read on the subject, with no practical research of his own into the matter in a state which had legal segregation.

With reference to the testimony of the witnesses Clarke and Krech, it is well known that psychology is not accepted as a science, and hence the opinions of psychology witnesses are of no probative value apart from the extent and degree of their actual practical research and investigation, on a basis broad enough to support a conclusion carrying weight.

Reference has already been made to the testimony of the witness Mrs. Helen Trager. She has made no study herself in a state having separate schools, but concedes that emotional conflict between the races and frustrations and aggressions do arise between the white and colored races where they live together in the same area in great numbers (R.176), and agreed with DeBois that what the Negro needs is education, and that what he must remember is that there is no magic either in mixed schools or in segregated schools from his standpoint. (R. 177.)

The testimony of Dr. Redfield, a professor of anthropology, taken in the case of *Sweatt v. Painter, supra,* was largely referable to educacation in graduate and professional school levels. He testified (R. 210) that he thinks that in every community there is some segregation that can be changed at once, and that the area of higher education is the most favorable for making the change. He also said (R. 211) what he thinks that the steps by which, and the rapidity with which, segregation in education can be removed with benefits to the public welfare will vary with the circumstances, and that the circumstances of the community and how long there has been segregation will have a bearing on it. He also testified (R. 212) that he knows from history that the attempt to force the abolition of segregation in the South did not work, and that he feels that the social attitudes and beliefs of the people in that day, of both races, had some bearing on whether it would or would not work. He said (R. 215) that he recognizes some limit to his theory of abolition of segregation, and he indicated a limit, which "will be defined in a particular conclusion as the particular circumstances." He stated (R. 223-224) that the attitudes of the community are complex, and that in considering what is best to be done for the individual in the community, the community attitude of both races should be considered.

As above suggested, all of the considerations advanced by the witnesses for the plaintiffs, as well as all of the general learning and information on the subject, could properly be taken into account by the Legislature in determining its policy on the question whether separate or mixed schools should be prescribed in its public school system. There

is disagreement among authorities on the subject; Dr. Redfield's testimony indicated this. The fact that there is disagreement and difference of opinion on the proper approach to efficient administration of the public school system at the present time and under conditions presently prevailing in race relations in South Carolina and in Clarendon County, does not serve to invalidate the State's constitutional and legislative action in the light of the considerations and information available to it. The showing indicates clearly that the Legislature had to make the choice of the kind of public school system it would operate, and the purposes of that system, and also its administrative requirements in respect to separate or mixed schools, and disagreement among the authorities supports the propriety of the legislative choice, instead of weakening it.

The situation is different from the Texas and Oklahoma law school cases. There graduate and professional schools were involved. The number and age of the students was very different. In the Texas case it was held not only that the separate facilities were not equal, but that under the peculiar requirements of the study of law it was impossible to make them equal. In the Oklahoma case there was discrimination and difference of treatment in the only facility provided by the state.

The public school system stands on a different basis. The witness Crow pointed out that mixed groups in graduate courses are quite a different thing from the mixing of public school pupils of all ages in the public schools, because few people are involved in graduate courses, they are on a mature level, and a college is removed from the community, whereas the public schools are right in the community affected (R. 135).

The plaintiffs' counsel himself, in his argument, candidly granted that there is a difference between university and college levels and elementary and high school levels. He said that he agreed that there is a difference, and "of course there is a difference."

It is respectfully submitted that the power of the State through its Constitutional Convention and Legislature, in establishing a system of free public schools, to assign to different schools the children of the two races living in great numbers in the same area and under the administrative conditions to be faced in the operation of such schools, has never been held to contravene the 14th Amendment, and should be sustained.

As to Appropriate Relief

This being an action for a declaratory judgment, it is in the equitable jurisdiction of the Court.

> "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest * * * It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative."

Eccles v. Peoples Bank, etc., 333 U. S. 426, 68 S. Ct. 614, 92 L. Ed. 784.

The defendants in the instant case have conceded on the record that inequalities exist in respect to the educational facilities and opportunities provided for colored pupils as compared with those furnished for white pupils in the district. The inequalities are not entirely one way, however, for the evidence shows that the white elementary school is in a bad state of repair, and practically beyond repair (R. 152), with poor lighting, while the colored 12 grade school has better lighting (R. 152), and, with improvements, approved and efficient education can be given in it (R. 57).

The evidence indicates clearly the necessity, either in School District No. 22, or in a district formed by consolidation of the five school districts, of a capital construction program as the means of and requisite to the development of improved educational opportunities for all the pupils of the district or districts.

It would be a physical impossibility, under the evidence, to follow the suggestion of the plaintiffs in the complaint that the colored pupils be admitted to the white schools, in an effort to eliminate existing inequalities. The white school buildings provided for 277 enrolled pupils cannot accommodate either the 866 enrolled colored pupils, or the 1,143 white and colored pupils, now attending the district's schools. Nor would the operation of all of the district's schools on a mixed basis bring about equality, even if permitted under the Constitution and Statutes of the State. This would only amount to an effort to achieve equal protection of the laws "through indiscriminate imposition of inequalities." *Cf*

Shelley v. Kraemer, 334 U. S. 1, 22, 68 S. Ct. 836, 846, 92 L. Ed. 1161, 2 A. L. R. (2d) 441.

The end to be attained is education, and this lies within the domain of State functions. The State of South Carolina, by its 1951 legislation, has declared that equality of educational opportunity for all children throughout the State shall be provided. It has set up a Statewide program of capital construction and equipping of school physical facilities, with adequate financial resources made available to school districts, under State supervision and control. School District No. 22, under the evidence, will be enabled to expand its physical facilities on a large scale, in comparison with its present facilities. Its trustees have already acted to avail themselves of the resources provided by the 1951 Act. They declare their intention to employ every resource at their command to bring about equality of facilities and educational advantages. Nothing appears which would lead the Court to discount their good faith.

The carrying out of the State's 1951 educational construction program will bring about striking improvement in the education of both races alike in rural areas such as the school district here involved. The record is replete with evidence of the importance to proper teaching and instruction of physical facilities and equipment.

It is respectfully submitted that it is in the public interest, and in the interest of better education of all of the children of South Carolina, that the Court, in its discretion, pass a decree which will permit the 1951 building program to be fully and efficiently carried out by the trustees. The Court is as much entitled to use its equitable discretion in the action which it takes in a declaratory judgment suit as it is in entertaining the suit.

Construction takes time. The legal rights of the plaintiffs are fully recognized, and the trustees are moving to accord them in full measure. They will be enabled to do so if adequate time is given to them by the Court's decree. Too limited a time may put it beyond their power to develop fully and efficiently the physical facilities which the educational requirements of the district and its pupils make necessary. The proper development of the district's educational advantages will bring about the better education of the pupils, which is a prerequisite to the improvement of racial relations and the solution of the State's racial problems.

The State of South Carolina has actually implemented the program of achieving educational equality advocated by such leaders as President Darden and Dr. Odum. It is leading the way in what the latter called "Operation Equal Opportunity." The State's program will result in the building up of the school systems of the districts of the State, and better education for the school children of both races. School District No. 22 is a good example of the benefits and improvements which will be brought about if it can be carried through. It is hoped that, in the cause of better education, the Court in its discretion will pass an order which will allow the construction program to be formulated and carried out in the school district, so that an increase in educational opportunities, rather than an otherwise inevitable deterioration of such opportunities, will be brought about in the school district.

CONCLUSION

We respectfully submit that the case is one which should appeal with peculiar force to the discretion of the Chancellor, and that the public interest and welfare will be best served by action which makes possible the efficient carrying out of the program to build up the public school system of the State which was advocated by Governor Byrnes in his Inaugural Address and in his message to the General Assembly; which was enacted as recommended by him; and which will be carried out under his continued leadership as Chairman of the State Educational Finance Commission.

We are attaching hereto, as a part hereof, a copy of the oral argument on behalf of the defendants, containing the quotations made from authorities, and otherwise clarifying its transcription.

Respectfully submitted,

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ORAL ARGUMENT FOR DEFENDANTS

Mr. FIGG: May it please The Court, in his argument counsel has referred briefly to the background to the decisions of authority on the question of the constitutionality of legislation providing for separate schools for the white and colored races. It seems to us that it has been settled by the Supreme Court of the United States, by the other Federal Courts, and has been extensively investigated in the great number of briefs that we filed in the case of Sweatt against Printer, of which almost everyone who has had occasion to go into this question have obtained copies. And, since the case of Sweatt against Painter, our own Court of Appeals of the Fourth Circuit decided the case of Boyer against Garrett, a Baltimore case involving equal facilities in reference to playgrounds, and whatnot, such as a golf course and swimming pool, which was decided in July, 1950, in which case the parties entered into a stipulation that for the purposes of the case no question was made as to the facilities and services furnished the different races being not substantially equal, and the contention of the plaintiffs that, notwithstanding this equality of treatment, the rules providing for segregation violated the provisions of the Federal Constitution. The District Court dismissed the complaint on the authority of Plessy against Ferguson. And, the principal argument made on appeal was that the authority of Plessy against Ferguson has been so weakened by subsequent decisions, that we should no longer consider it binding.

The Court held:

"We do not think, however, that we are at liberty thus to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which it expressly refrained from re-examining, although urged to do so, in the very recent case of *Sweatt v. Painter,* 70 S. Ct. 848. It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded."

"We need not consider arguments based on the 1st Amendment or the Charter of the United Nations. The 1st Amendment manifestly has no relation to athletic contests, and there is nothing in the Charter of the United Nations which, if applicable here, is of broader scope than the provisions of the 14th Amendment in forbidding racial discrimination."

Under the state of the authorities, as they now stand, it would seem that the statement which the Court of Appeals for the District of Columbia made in the case of *Carr v. Corning,* 182 F. (2d) 14, a school

case in the District of Columbia, which presented the same question of what might be called *per se* unconstitutionality of laws providing separate schools for the races, is pertinent. The majority of that court, in an opinion by Circuit Judge Prettyman said this:

> "It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Constitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did. Since the beginning of human history, no circumstance has given rise to more diffcult and delicate problems than has the existence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient process of community experience. Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstances. We do not believe that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 meant to foreclose legislative treatment of the problem in this country.
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> "This is not to decry efforts to reach that state of common existence which is the obvious highest good in our concept of civilization. It is merely to say that the social and economic interrelationship of two races living together is a legislative problem, as yet not solved, and is not a problem solved fully, finally and unequivocally by a fiat enacted many years ago. We must remember that on this particular point we are interpreting a constitution and not enacting a statute."

Now, counsel mentioned the dissenting opinion in the *Plessy case* of Mr. Justice Harlan, as indicating a weakness of that authority as applied to this educational case. I only want to advert briefly to the background, as we see it, of the law on this question.

Prior to the war in 1861, there were laws providing for separate schools for the races in many states north of the Potomac River. There was one in Massachusetts, which was upheld in an opinion by Chief Justice Shaw in the case of Roberts against Boston, which was quoted by Mr. Justice Brown in the *Plessy case*. There was one in New York which was upheld by the Court of Appeals of New York in the *Gallagher case*. There was one in Indiana, one in Ohio, and various

other States. And, Mr. Justice Brown took occasion in his opinion in Plessy against Ferguson to refer to the normal disposition of public school matters of the states, which had separate schools for the races prior to 1861.

They show that the courts of those states had upheld the legislative prerogative of the legislative branch of the State Government, which provided public school systems, to enact provisions for the regulation of those school systems.

Now, prior to 1861, the power of the States which had dealt with the question of providing separate schools for the two races had not been questioned by court decision. It was the order of the day. And, it was the anaolgy which Mr. Justice Brown used as settled and normal, when he undertook to apply it to the facts of Plessy against Ferguson.

The research on this question in recent years has involved inquiry into the legislative history of the fourteenth amendment. And, it seems to us that the legislative history is conclusively compelling that the Congress that proposed the 14th Amendment did not intend to interfere with the prerogative of the States in performing the States' function of providing education, and the States' power in providing public schools, to make provision for the separation of the white and colored races in those schools. The same Congress which submitted the 14th Amendment to the states of this country also enacted legislation providing separate schools for the two races in the District of Columbia. The same Congress that proposed the 14th Amendment also enacted the Civil Rights Legislation. And there were efforts in the Congress to make provision in the Civil Rights acts prohibiting separation of the races in the public schools of the states. And on every occasion, those proposals were defeated, and the Civil Rights Acts had no provision prohibiting states in regulating their school matters to provide separate schools for the races.

And the legislative history confirms the judgment of the judges of the Supreme Court of the United States who have passed upon these matters since, and those who have adverted to the question, who have dealt with the subject, have assumed that it was well settled. It might be said of this question, in a judicial way at this time, that the power of the states to separate the races in providing public school systems is the normal and not the abnormal proposition.

In the words of the highest Court of Maryland some time ago, as I was reading, the Court said in one short sentence "Separation of the

races is normal treatment in this State," and separating the races in public schools through the state's enactment which provides for those schools, and levies taxes for those schools, has been normal in educational legislation ever since 1849, and earlier, as shown by the decisions that the Court referred to in the *Plessy case*.

And then in the *Gong Lum case*; and the *Cummings case* later, involving an effort to enjoin the construction of a high school for white children on the ground that none had been afforded for colored children at that time, Cummings against the Board of Education, decided in 1899. Mr. Justice Harlan wrote the opinion of the Supreme Court.

Counsel has referred to his dissenting opinion in the *Plessy case* on the question of separating the races in transportation. And, Mr. Justice Harlan's dissenting opinion in the transportation case has been much quoted as weakening the application or as a foundation of approach to weaken the application of Plessy against Ferguson in school matters. But, Mr. Justice Harlan never did agree with the contentions in these school cases which have been made in his name, on the basis of his dissenting opinion in Plessy against Ferguson, because in later school cases, Mr. Justice Harlan drew what he considered an obvious distinction between the other cases; the *Plessy case* and the school cases.

He said in the *Cummings case:*

> "Under the circumstances disclosed, we cannot say that this action of the State court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs, and to those associated with them of the equal protection of the laws, or of any privilege belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, *the education of the people in schools maintained by state taxation is a matter belonging to the respective States,* and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

And, Mr. Justice Harlan concurred in other school cases. Mr. Justice Harlan dissented from the decision in *Berea College v. Kentucky,* which upheld the Act of Kentucky which prohibited the mixing of races in

private schools in Kentucky. Mr. Justice Harlan in his dissenting opinion said:

> *"Of course what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense."* 211 U. S. at 69.

And, in the *Gong Lum case,* Mr. Chief Justice Taft, speaking for a unanimous court, reviewed the *Plessy case.* He said this about Plessy against Ferguson:

> "In *Plessy v. Ferguson* * * * in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored in railway coaches, a more difficult question than this, this Court, speaking of permitting race separation, said,
>
> " 'The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.' "

The Court concluded:

> "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear * * *"
>
> *"The decision is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment."*

In other words, to paraphrase the Supreme Court of Maryland's statement, it was the normal thing, and most common prior to 1861, in states most zealous for the political rights of the colored race. It had never been questioned by court decision under the Constitution of Massachusetts, which contains a provision quite similar to the equal protection of the laws clause. And, Mr. Chief Justice Shaw's decision relied on or referred to by Mr. Justice Brown in the *Plessy case,* was deciding a case under the same fundamental proposition of law that these education cases come up under and that this case comes under. The equal protection of laws clause was substantially the same as the provisions in the Declaration of Rights of Massachusetts, and the Court there found nothing in the State's Declaration of Rights that was contravened by the Massachusetts statute for separate schools.

Now, in this case, as the Court of Appeals of the Fourth Circuit said, the Supreme Court expressly refrained from re-examining Plessy against Ferguson in Sweatt against Painter. It therefore expressly refrained from re-examining the body of the law on the power of the legislatures with reference to public schools, which is far older than the doctrine of Plessy against Ferguson, which Mr. Chief Justice Taft said in the *Gong Lum case* was a more diffcult question than a school case.

Now, the *Cummings case* is of peculiar interest, it seems to us, here. In the *Cummings case,* an injunction was sought against a white school because there were no Negro schools being built at that time. And, in that opinion, I think Mr. Justice Harlan pointed out that it would not help the cause of education to enjoin that school because another one was not being provided. And the Court in that case did recognize that the provision of school buildings and equipment and facilities cannot always be done at the same time and with the same identical architectural plan and simultaneously.

There is chronology in school-building construction. The newest school is always the best school, if the money hasn't been thrown away, or if there were money enough to have started the trustees out in building it in the first place, unless there was an emergency presented. The best school in the City of Charleston, where we are now, is the new colored Burnet Rhett Elementary School, and I have been told it is the best school in the State. It is the newest school in South Carolina, and it is a fine example of a school building.

In Columbia we have the same proposition. The best schools in Columbia today are the colored schools because they were the most recently built.

South Carolina has suffered, but not uniquely, from the lagging behind of the development of school buildings and facilities and education in rural sections. It's not unique because if you will read in encyclopedias, you will find that rural education is said by the experts to have lagged—and we have some mention of that in this record—behind the development of school systems in the urban centers, where there has been more resources and more school materials to encourage working with them.

The problem in this state, as stated by Governor Byrnes in his inaugural address fairly and frankly, has been that the boys and girls in the rural sections are not going to get the educational buildings and

facilities and opportunities that we want them to have and that they're entitled to,—and that doesn't mean one race any more than the other,—unless the power of the State of South Carolina is thrown behind that cause. And in this year, 1951, under his leadership, under his statement to the people of this state when he was inaugurated, we are going to furnish these facilities for everybody and we're going to have substantially equal facilities for the white and colored pupils because it is right—and that is sufficient reason.

The people of this state and the Legislature have followed that leadership, and they have gone into action, and they have enacted legislation placing the resources of our people behind that program, to the extent of a three percent sales tax,—not a two percent or a one percent, but a three percent sales tax, which I believe is regarded as heavy sales taxation anywhere. And, in the provision for seventy-five million dollars worth of bonds—I saw the other day it would take approximately forty million dollars perhaps, on the educational statistics available in the official report of the Department of Education, to bring about immediate building and facility equality between the two races throughout the whole state. That doesn't mean that it doesn't exist here; that means that we know that there is inequality in a great many parts of South Carolina, just as there is inequality between those same parts and other parts of South Carolina as to both white and colored children.

The program was intended—as it said and declared—and the purpose is,—and those charged with the enforcement of it have devoted themselves to the task—of furnishing equality of educational opportunities for all the children throughout the state; so that the State has taken the burden now of equalizing education for all the children,—not just the city children, not just the children of industrial sections, but the power of our people is behind every child, while or colored, in South Carolina to get education.

And the Governor has taken the Chairmanship of the State Educational Finance Commission to furnish continued leadership to see that the program that he advocated in his inaugural address is carried out. Now, I'm not going into the details of that legislation. Mr. Crow on the stand yesterday testified in a graphic way as to what this legislation at the present rate of attendance today would mean to this school district. It would mean to the five districts who supplied white school children—and who have the population for the colored school children that you

heard of—something over 2100, I believe—it would provide a total immediately available, as soon as the bond issue can be issued—and that would be July the first because that is the effective date of the revenue—of over four hundred thousand dollars. And you remember from the testimony of Doctor Whitehead in which he summarized the existing facilities, including this brick high school that has been talked about—this centralized high school—at less than seventy thousand dollars of school facilities now. So that the four hundred and something thousand dollars available immediately on the basis of a loan, on a very low average daily attendance now existing, would re-build the white and colored systems of this district as soon as the architects and the contractors and whatnot can complete the job. And, it would give the facilities for education to all of the pupils of those districts; and consolidation of districts is one of the prime provisions of this school legislation, with the authority in the commission—not in the Trustees, not in the County Board of Education, but in the State Commission—to see that proper district lines are laid out, so that this financing will do the most good, and will bring the results that the people of South Carolina will expect from the tasks that they have entered upon under the leadership of the Governor.

Now, under Cummings against the Board of Education, are we to say that because inequalities might now exist in a particular place that schools may not be built, that education may not be provided. In the *Hurst case,* which was the sequel, I believe, to the *Oklahoma case,* it seems to me that The Court said either enroll this pupil or don't enroll anybody. In other words, either enroll this applicant or stop giving education. Of course, the state took the first alternative there, and that was the alternative there, and that was the alternative approved by the lower court. And, the Supreme Court said that The Court had carried out the mandate of the decision in writing that order.

Now, if Your Honors please, I think it is recognized—at least to this writing it has not been re-examined—that it's the function of the states of this nation to provide the educational systems, the educational legislation, the educational taxation, the public school systems. The end, as I said in my statement yesterday, is education. It's the same statement that I read to this lady this morning on the stand in the Myrdal quotation. The end is education. The end is not to equalize down or to equalize out; the end is to equalize up. But, that takes time and the only way we're going to have education is to equalize up.

There's no use to go into a situation where equality would be forcibly directed toward slicing educational privileges to make things equal. And that was the very clear understanding that Mr. Justice Harlan had of the problem in the *Cummings case.* And he refused to enjoin that school because he anticipated,—and the court did,—that that was a contribution to the cause of education, and that it would be followed by other evidences of the determination of the local authorities there to continue to bring it about under the school system.

Now, the State has the function of providing education, and this state has said we're going to provide, as a matter of statewide interest, the physical facilities for the school system of this state for education. And I respectfully submit, if your Honors please, this being an action for a declaratory judgment and in the equitable jurisdiction of The Court, that The Court is entitled to exercise its discretion in the cause of getting more education, and not to the end of following out the consequences which inevitably would flow from the position just taken by counsel,—that that means "now." That isn't compelling, as I understand it, upon the Chancelor, upon his conscience, upon his discretion. He may bring about the result which Courts of equity have come into being to bring about,—the just and the beneficial and in the exercise of that equitable discretion.

Judge PARKER: What decree do you suggest The Court ought to enter in the light of your admissions?

Mr. FIGG: We had in mind, if Your Honors please—our suggestion is very briefly included in this statement, along this line: The defendants urge the Court in its discretion to give them a reasonable time to formulate a plan for ending the inequalities, and for bringing about equality of educational opportunities in the schools of this district, so that they may present plans for the Court's consideration, with the approval of the state authorities necessary under the 1951 act, having in mind that it would have to have the approval of the Educational Finance Commission before it would be more than a proposal or a thought in mind. They would be for the Court's consideration, the Court retaining jurisdiction, if it saw fit, of the cause in the meantime so that it may be enabled to grant such relief as may be proper in the event that the defendants should fail to comply with the Constitutional standards prescribed in the applicable decisions.

Judge PARKER: Well, I'm not much impressed with that. You have come into court here and admitted that facilities are not equal, and the evidence shows it beyond all peradventure. Now, it seems to me that it's not for the Court to wetnurse the schools. Assuming that segregation is not abolished by the decree, it would be proper for this Court to direct an equalization of educational facilities. And we wouldn't tell you how to do it. We wouldn't attempt to supervise the administration of the schools; all we can do is to tell you to do what the Constitution enjoins upon you. Now what I'm asking you is, what sort of decree ought to be entered with that end in view.

Mr. FIGG: I think, if Your Honor pleases, that the decree should take into account the fact that school buildings cannot be built overnight. They have got to be built over a period of time. There have got to be plans drawn, there have got to be contracts made, and there has got to be construction done. And the reason that we suggested that the Court might retain jurisdiction and determine just exactly what these trustees were going to do was, because we would be prepared to lay before the Court equality, with financing and with the ability to put it into effect right away, on buildings, on facilities, and various other phases of this school system. And, if we didn't do that,—if the Court found that we didn't measure up,—if there was any derailing of this program, the Court would have the same jurisdiction that it would have today to guarantee immediate and proper relief.

Judge PARKER: Well, the Court would have that anyhow. The Court, in the exercise of its contempt powers would deal with failure to comply with its decree. But that's a different sort of a thing from holding the case back here and changing the decree from time to time. And that's what you seem to suggest, and I'm not certain that that's what you want us to do.

Mr. FIGG: I had hoped that Your Honors might consider that, because after all, as I said a while ago, the logical result of my statement that we are after education and educational facilities—

JUDGE PARKER: Well, have you considered the course that was taken in the *Virginia cases*?

Mr. FIGG: No, sir.

Judge PARKER: We had this same problem in a number of counties in Virginia, and my recollection is that the District Court,—it wasn't a three-judge court,—but it came on appeal to the Court of Appeals.

And, my recollection is that the District Judge there directed that they equalize conditions within a given period. And the period is an important matter of consideration.

Mr. FIGG: Yes, sir.

Judge WARING: Wasn't the *Virginia case* brought on the distinct plea of separate and equal facilities and asking that they be equalized? As I understand it, this Court has got to face the issue of whether segregation is inequality *per se* or not.

Judge PARKER: Well, that is unquestionably true, but he's making his argument on the theory that segregation would not be abolished, and I'm asking him what decree he suggests if The Court takes his view of the segregation issue.

Mr. FIGG: Well, I think that a decree that equality of facilities be brought about, and of educational opportunities, within a certain time,— I don't know just what time would be practical under existing conditions. I know this: We're trying to build a tuberculosis sanitarium in this county, and we're having difficulty getting bids right now because the defense activities have called bidders away. They have taken other commitments, and we have had a shortage of bidders. Now, those kinds of things, I don't believe would interfere with the carrying out of an orderly plan of constructing a school system. And, I have in mind personally, from the testimony that I have heard, that a great part of this school system up here is going to have to be rebuilt. The white elementary school, I think is going to have to be replaced. I think that schools are going to have to be built in many places, and I think that transportation is inevitably going to come into being in this layout up there under the new school law, and that the working together of the transportation and of the provisions as to facilities is going to make an efficient school system.

Now of course the issue has been presented here that separate schools are violative of the equal protection of the laws clause. I have made my suggestion to The Court on the premise that, as I told the Court, we think that under the decisions, that the Supreme Court of the United States cases up to this time sustain our position that segregation cannot be adjudged to violate the equal protection clause of the 14th Amendment. The State has got to give this education. The Courts, of course, can pass decrees to enforce the laws of the land, but it's going to be the business of the states and their authorities to give the

education. And I much prefer to see the matter take a positive course, which is going to produce in the quickest possible time education in this area, and of course which is going to avoid the possibility of compliance by reduction rather than compliance by addition. I want to see the purpose of this 1951 Act carried out throughout all of South Carolina. I think that nothing can be done in the cause of race relations greater than to improve the educational conditions in every section of this state, and for all of the children of this state. It has been education which in the last 25 years has caused such great progress to be made in race relations in our section of the country,—education and internal improvements such as highways. And we have been making great progress in race relations, and there will come a time, in the opinion of many of these students that I have talked to, when the problem we are discussing here today will no longer exist in the United States. But, I say at this time, in the face of the evidence that we all know, of the considered public utterances of men who have given their lives to the improvement of race relations, that now is not the time to equalize by throwing the races into mixed schools, that utter confusion would exist.

I mentioned Doctor Howard Odom this morning, and his speech in Atlanta in April. I have talked with him since his speech, and he told me the other day, he said, "Why, that would upset 25 years of work that I have done in the field of race relations." And, he is acknowledged to be the best informed man in that field from years of practical experience and study. And the zeal and enthusiasm with which he has burned the midnight oil trying to bring progress in the race relations of our section—and he values those 25 years of work that he's done in that field, and he doesn't want to see them upset by a measure that, as the court said in the District of Columbia, "goes counter to the experiences of human beings in their efforts to provide government and other things for themselves through the centuries."

Now, if Your Honors please, in this part of the country, as Doctor Odom and others have written, you can't pass laws against the "mores" of peoples, against their heritage—their complex heritages—that prevail in this part of the world. Here is what Doctor Odom says on this:

"First in the southern situation is the cumulative racial and conflict heritage that has gone into the architecture of all cultures, whether in the bi-racial South or in India, in Pakistan, in China, in all the wayplaces of Africa, Australia, New Zealand, and in uncounted little culture

islands of the Pacific; and in counted big nations and little democracies of the western world. This heritage, which is basic to conflict and war, is also the very heart of group loyalties, patriotism and institutional solidarity, symbolic of the universal formula by which men covenant 'for God, for country and for home.' The Southern culture structure rates the same diagnosis as any other.

"In the Southern situation is the same cumulative heritage which leads India's powerful Nehru, as late as yesterday and in tomorrow's news, to beg for the preservation of world peace and world order with hope and faith, but with an appeal for character and patience. But he adds, 'Anyway we can't have it suddenly or by decree. One has to grow up to it;' and again, in what he terms 'an unbelievable varied world,' he protests the quick 'imposition of any form of foreign domination against the will of the people,' on the structural grounds that 'no solution which is not accepted by large masses of the people can have any possible enduring quality.' Nor would Nehru relish the stereotype designation of being caricatured as a 'gradualist,' outmoded echo of superficial rationalization."

Doctor Odom knows the southern accumulated 'mores' of the peoples, that this part of the world has to deal with, in the last seventy-five or eighty years. You can't just write those things off; they have happened and go into the people and the great feeling of good will and of working together that has bred throughout the south between these two races in the last fw years, being attributable to the work of men like that and of others. And, that man tells me that this kind of business in the public schools would upset 25 years of his work.

Now, if Your Honors please, he said this with reference to the monumental task of equalizing facilities for education: This is the big problem challenging not only the will, strength and capacity of a strong people but the cooperation, judicial interpretation, and Constitutional structure of the nation. He said his agenda for equalizing educational opportunities applies to all levels of schooling and assumes the normal status and processes of segregation and non-segregation consistent with the development and administration of educational systems everywhere. He refers to the fact that he believes that graduate and professional schools should immediately move to admit the pupils of both races to their schools, but he says this; that this is a structually different situation from elementary and secondary schools in the framework of America's private, religious, and public school system. And then he says:

"What is meant when we guarantee the conversion of the Southern compound bi-racial culture to an American complex integrated multi-cultured society? It must be clear that we mean exactly that; the moving of the South from isolation and separatism, from conflict and organic structures which prevent large segments of the people from having equal access to opportunity, resources, work, personality, recognition, into cultural arrangements which permit free movement toward all opportunities. This means not only in the South but all over the nation. It means freedom for the Negro to take his place as an integer of cultural structure exactly as does the Jewish, the European Nationals, the Oriental peoples, as well as the many strands of a world society inevitable in the total fabric of America now the cultural as well as economic and political capital of the world. Such a conversation brings with it no more compulsion or specifications for negating the facets of race and ethnic minorities, supreme in whatever personality and cultural loyalties they may wish. Such a conversion automatically, as in any organic structure or process, carries with it the inevitable continuity of separateness, autonomy, and segregation inherent in not only the American ideal but in all the newer reaches of social science, philosophy, freedom for all the differential-groups to have a say in how they shall integrate themselves into the new world society." He was thinking then of both the white and colored people. And, he says:

"There are several other aspects of the situation with reference to segregation in education that carry a heavy load of responsibility. One is the continuity of the remarkable record of self development, distinguished achievement and high morale of Negro schools and colleges. For those who know the high motivations, the effective work, the institutional loyalties, the student bodies, the professors—it is no easy decision to recommend anything but an increase of support and appreciation of both what they are doing and of the opportunity for students and faculty to work together without frustrations and aggressions."

Now, if Your Honors please, here is a great deal of material that has been collected in the general learning on this subject. It is all predicated upon all conditions and research in this state, and other states affected on this question—not in Philadelphia, not in California, not in Springfield, Massachusetts, and other places, but right here in South Carolina, North Carolina, Virginia, Georgia, and in these other states.

And that body of learning was recently emphasized by the speech that Dr. Frank Graham made to the joint assembly of the legislature of

North Carolina on the occasion of the unveiling of Governor's Aycock's portrait, when he paid a great tribute to Governor Aycock and his leadership in the cause of education around the turn of the century:

"In view of the origin, history, and power of the 'mores' of people based on the universal consciousness of kind, an historic social heritage, the degree of the visibility of the difference between raced, the largeness of the numbers of the groups involved and the economic competition of the low income groups, there is needed a new emphasis on the influence of religion, education, personal kindness, decent respect for the human dignity of persons, and voluntary cooperation of people of good will for better relations in the local communities, in the long haul of the generations for justice on this Earth. To our good Northern friends, I emphasize the unwisdom of using federal legislation and force at educational levels beyond the levels of acceptance by the people in the States. Such unwise compulsions cause bitter set-backs not enduring progress which mainly comes from within the minds and hearts of the majority of the people in the States."

And, Governor Darden's speech at the Southern Governor's Conference right here in Charleston last November was a statesmanlike approach to this same problem. Governor Darden referred to the flare-ups around the world in South Africa, Australia, Pakistan, China, New Zealand and various other places in dealing with racial conditions and racial cultures and racial heritages, and whatnot, and he pointed out then that, while his view was that the greduate and professional schools should be open to all, because students who go there at a mature age for the education which they are hunting for, or they wouldn't go there, and that it shouldn't bother them what others are there for the same purpose, and at the same fountain of learning, but, when you come to the question of elementary and grammar and high schools, then you find Governor Darden pointing out the disastrous consequences of this forced mixing of the races in the public school systems provided by the southern states.

Now, if Your Honors please, I submit that this Court, under the Constitution and the decisions which have interpreted it, is not required or even warranted in holding that the Constitution and Statutes of South Carolina providing for these separate public school systems are unconstitutional. I submit also under the philosophy of the *Cummings case* and the other cases, in the light of the background and what has been done now to carry out the job of having a public school system in

this state, in the light of the concrete and tangible evidence which we have laid before the Court of the fact that equality will be provided—that it would be appropriate for this Court in the exercise of its discretion to make a practical order that we can comply with, that will accomplish the building up of education and the provision of equal facilities and will permit the State of South Carolina, without confusion and without all of the controversies that would be perhaps a little less in degree but only in degree than it was when the two reconstruction governors of South Carolina warned the reconstruction constitutional convention against that very proposition, and a resulting twelve-year sequel of mixed schools and no education or deteriorated education in the state had come about.

We submit, if Your Honors please, that this state wants to give education. It wants to solve these social problems through education. It wants to carry out the educational system of instruction and learning, which it has determined that public schools should be provided for—not social development or the development of personality. The logical end of following the views of the educational experts as to what constitutes modern education as they see it would seem to be that the State would not only have to do away with separate white and colored schools, but would also have to prohibit church schools and private schools, and require all children to go to the same public school system, so that, in the attrition of the hurly burly that would ensue, all children would receive the same social adjustment and personality development. The State is not required to adopt anybody's expert opinion as to what is the education which it affords. It is entitled to provide a system of schools to grant equal education, equal curricula, equal facilities, equal buildings, equal instruction and opportunities. And then these two races will continue to grow in their bi-racial cultures until the job of those schools has been done, and time has developed different adjustments to the circumstances, and then this problem will disappear as it disappeared in times past in the other states, which have been permitted to deal in their own time with the problem of their legislative functions.